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A Question of Ethics, Federal Judge Presides Over a Case Related To His Own Fortune

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A Question of Ethics

Federal Judge Presides Over a Case Related To His Own Fortune

Friend Who Made Him Rich Is Involved, as Well as Bank In Which He Holds Shares

But He Sees No Conflicts

By JIM MONTGOMERY
Staff Reporter of THE WALL STREET JOURNAL

NASHVILLE, Tenn.—Federal Judge Frank Gray Jr. built a small fortune after his friend John Jay Hooker Jr. invited him in on the ground floor of a hot business venture. The judge invested $2,000 and got out a few months later with profits of at least $100,000 and possibly close to $200,000.

Today Judge Gray presides over a bankruptcy proceeding involving Whale Inc., a corporation of which Mr. Hooker is a major stockholder, a creditor and a former director. Whale Inc. owes $3.5 million to a bank of which the judge is a shareholder. Judge Gray's brother is a vice president of that bank. Whale Inc. owes $16,456.66 to another bank of which the judge's wife is a shareholder.

Should Judge Gray disqualify himself from hearing and ruling upon the Whale case on the grounds of a multiple conflict of interest? The American Bar Association's code of ethics would seem to suggest he should. Many lawyers concerned about the commission or even the appearance of judicial impropriety certainly say he should.

But Judge Gray isn't budging. He says he wouldn't think of vacating the bench in the Whale case. He declares he sees nothing wrong in what he is doing, and he seems surprised that anyone else would.

A Question of Ethics

There is no evidence that the 62-year-old judge has done anything illegal. Indeed, there are no laws that categorically prohibit a judge from hearing a case in which he has a personal financial stake. But there are suggested guidelines and rules of ethics, and it is Judge Gray's ethics that appear open to question.

Consider, for example, Canon 4 of the ABA's rules of ethics for judges, which states that "a judge's official conduct should be free from impropriety and the appearance of impropriety." Canon 32 of the same code is more specific: "A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgement."

Judge Gray did not just "accept" a favor from Mr. Hooker, a lawyer who had practiced in his court. He actively solicited that favor. The judge asked for and, as one of a select group of 106 persons, was granted the privilege of buying stock in Mr. Hooker's newly formed fried chicken franchise chain for $1 a share. (Mr. Hooker started the venture after he was defeated in an election for governor of Tennessee in 1966. He is trying again for that post in next month's election.)

After the judge bought his 2,000 shares, a two-for-one split reduced his investment to 50 cents a share and increased his holdings to 4,000 shares. Then the company was renamed Minnie Pearl's Chicken System Inc. and in May 1968 just under 400,000 shares of its stock were offered to an eager public at $20 a share. The offer was instantly oversubscribed, and the very first over-the-counter trades were made at a bid price of $32. By mid-July the high-flying chicken stock had soared to $56, and the price remained above $40 through 1968.

A Tidy Profit

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A Tidy Profit

Since then, it has plummeted. With another new name—now it's Performance Systems Inc.—the stock has attracted recent bids of around 37½ cents a share. Even that price, taking into account a three-for-one stock split declared after the first public offering, is equivalent to a pre-split price of about $1, double the judge's investment. Reports issued a few weeks ago by the company show why the stock plunged: It lost $30 million last year and $5 million in the first half this year.

The stock price plunge meant that hundreds of shareholders who bet on Mr. Hooker lost heavily. But not Judge Gray. The judge says he "made some money," on the stock, but he won't say how much. His private investment proceeds "are not a matter for public discussion," he says. But he does reveal that after holding his shares long enough to qualify for long-term capital gains (six months), he "sold most of it in 1968, not at the high ($56) and not at the low ($32)." Thus, the judge reaped gains of anywhere from 50 to 100 times his initial investment.

All that took on new relevance last May 20, when Whale Inc., a fast-paced little conglomerate involved in real estate, franchise-operating and metals, and also a Hooker enterprise, filed a petition for bankruptcy—before Judge Frank Gray Jr. in U.S. District Court for the Middle District of Tennessee here. There's no doubt that John Jay Hooker Jr. has a vital stake in the outcome of the case or that Judge Gray himself has a lesser stake.

Mr. Hooker and his brother Henry together hold the second largest block of stock in the crumbled corporation. At one point, Henry Hooker was president of Whale and both the brothers were directors and controlling owners. The two Hookers together are major creditors of Whale—the company owes them $1.5 million for which they hold a note—so they have a big financial stake in the outcome of the bankruptcy hearings.

A Political Impact

Also, the Hookers and a third party guaranteed $3,150,000 of a $3.5 million debt that Whale owes the Third National Bank of Nashville. That's the bank Judge Gray's brother works for and the one in which the judge himself owns stock that he says is worth "more than $5,000." His wife, the judge says, owns "about $6,000 worth" of stock in the Harpeth National Bank in nearby Franklin, Tenn., where the Grays live. That is the bank to which Whale Inc. owes $16,456.66.

Whatever action Judge Gray takes in the bankruptcy proceeding could also have an impact on Mr. Hooker's fortune at the polls on Nov. 3. The judge may well be called on to make a ruling before then. A hearing is scheduled for today, and the trustee in the case has

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already told Judge Gray that he doubts he will be able to devise a plan of reorganization to save the company. If he doesn't the judge will have several choices, among them declaring Whale bankrupt or taking the case under advisement.

Impartiality is highly important in the type of bankruptcy proceeding at issue here because of the absolute powers wielded by the judge. He can, for example, reject any reorganization plan submitted by the trustee, or he can order the trustee to draft a new plan even when the trustee insists it can't be done. He even had the power, at the time the company filed its petition, to deny the request for reorganization and to force the company into bankruptcy.

In the view of some attorneys, Judge Gray should have foregone all such choices and excused himself from the Whale proceeding altogether.

Typical is Fyke Farmer, a Nashville attorney. He says that even should the judge rule evenhandedly, his acceptance of "a very substantial favor" from Mr. Hooker lends at least an appearance of judicial impropriety that reflects discredit on the courts.

However impartially the judge handles the case, Mr. Farmer says, there could be suspicions that he favored the Hookers, as well as the banks in which he himself has an interest. Moreover, he says, there is the opposite danger that Judge Gray might bend over backwards to avoid favoring them—and thus do a disservice to the Hookers and the banks.

Charles Morgan Jr., southern director of the American Civil Liberties Union and an outspoken advocate of stricter rules on judicial ethics, won't comment on the Gray case because he says he's not familiar with the details, but he says laws are needed that would prevent Federal judges from even a hint of conflicting interests. He would like to see "a Congressional requirement" that appellate and district judges convert *all* their investments into Government securities upon assuming office. The Government bonds should then be "held in trust during their tenure," he believes.

Vague Guidelines

Mr. Morgan concedes such a requirement might impose financial sacrifice on many a jurist, but in his view the honor inherent in holding a judgeship should make up for that. "After all," he says, "they are appointed for life, and all men who serve their country must pay the price of patriotism." (The price, in this instance, is hardly a vow of poverty—Federal judges make $40,000 a year and up.)

Most critics wouldn't go quite as far as Mr. Morgan, but nearly all agree that present strictures on a jurist's financial pursuits are not only inadequate, but also so vaguely stated as to be all but meaningless. Several times in recent years Federal jurists have become publicly embroiled in ethical questions concerning their own finances—almost always with unfortunate consequences for the judges involved and almost always involving matters for which no clear-cut rules or prohibitions existed. That neither Abe Fortas nor Clement Haynsworth sit on the Supreme Court today is due in large part to exposure of financial ties that caused their integrity to be questioned but that did not break any laws or violate any professional code.

The lack of clear guidelines revealed by those two cases has spurred the ABA to appoint a committee that is currently drafting a new and stricter code of ethics for judges. It also led to the introduction of legislation in both houses of Congress that would more strictly govern the financial activities of judges.

For the time being, though, about all a judge has to go on is a Federal law that requires that "any justice or judge of the United States shall disqualify himself in any case in which he has a *substantial* interest . . . or is so related or connected with any party or his attorney as to render it improper, *in his opinion,* for him to sit on the trial, appeal or other proceedings therein."

A Clear Conscience

The language of that law clearly leaves it up to a judge himself to decide if his own interests in a case are "substantial" or if his connections with the litigants involved are "improper." Just as clearly, Judge Gray has decided that his interests and connections in the Whale case are neither substantial nor improper. Indeed, he says he "will never take any case in which I have an interest." Regarding Whale, he says, "I could see no possible conflict of any sort. And certain'y none has developed. I will participate in nothing in which I could be open to an appearance of conflict of interest."

But to many, he already is participating in such a situation. And though he talks freely when asked about his relations with Mr. Hooker and his stockholdings in banks to which Whale is beholden, those facts were not revealed in a report the judge filed in July listing his financial interests in institutions that are named parties in lawsuits he is hearing. The U.S. Judicial Conference, a policymaking body for the nation's 450 Federal judges, this year for the first time required that Federal judges file such reports.

The report Judge Gray filed covered the first half of 1970, but it did not list the banks involved in the Whale case in which he and Mrs. Gray hold stock. Technically he may have had no reason to list them, although some assessors think otherwise. The question reads: "Have you participated in the hearing or decision of any case, knowing at the time of such participation that you, your spouse or any member of your immediate family in your household had a financial interest in any of the named parties?"

Since the Whale case was a voluntary proceeding filed by the company itself seeking to reorganize under chapter 10 of Federal bankruptcy laws, Whale is the only "named party" in the title of the petition. But the names of the larger of the two banks in which the Grays own stock was included in the list of creditors involved.

A Fried Chicken Flyer

The only financial interest the judge listed in his July report related to a case involving National Life & Accident Insurance Co., a subsidiary of NLT Corp. The report discloses that Judge and Mrs. Gray "own stock valued at about $30,000" in NLT. In that case, the court was merely holding the proceeds of an insurance policy until a disagreement between claimants was settled.

Judge Gray's assessment of his personal wealth indicates that a good portion, if not most, of it is based on the proceeds of his relationship with Mr. Hooker. Other than his $30,000 of NLT stock and his bank shares, he says he and Mrs. Gray own stocks worth between $1,000 and $5,000 in each of 10 other companies, all of which he declines to identify. He puts the total value of those holdings at "about $30,000" and says his only other investments are "some municipal bonds," dollar amount not revealed.

Such modest wealth is probably fairly typical for a man who practiced law in his small hometown for 33 years before being named to the bench. Judge Gray got his law degree from Cumberland University in 1928 and practiced in his native Franklin, Tenn., until 1961, when he was appointed a U.S. District judge by the late President Kennedy. From 1956 to 1958 he was a member of the board of governors of the Tennessee Bar Association, and in 1960 he was comanager of the late Estes Kefauver's campaign for reelection to the U.S. Senate.

Judge Cray says he asked to get in on the fried chicken franchise business when Mr. Hooker "mentioned to me in a casual conversation" that he was starting up such a venture and had contracted to use the name of Grand Ole Opry star Minnie Pearl, a name held in high regard in these parts. "I told him it sounded to me as if he had a good idea that might make some money and I'd like to get in on it," the judge says. "I told him I'd like to take a flyer in it."

Judge Gray was not the only prominent individual among the 106 favored persons selected by the Hookers to "take a flyer" in their venture by means of investment in a private stock offering. Others so blessed included another Federal judge, two Tennessee Congressmen—Richard H. Fulton and William R. Anderson—and former University of Tennessee football coach Doug Dickey. Ironically, when the stock was later offered to the public, residents of Tennessee couldn't buy it until it began trading on the over-the-counter market. The state of Tennessee refused to register it because it considered the $20 offering price "unfair and inequitable."

It May Get Stickier

To the judge, all that is water long under the bridge and should have no relevance to the case he is currently hearing. But there is a chance that the Hooker brothers' involvement in the Whale case may yet deepen and that they may be dragged into it as defendants and not just parties related to a bankruptcy proceeding. That's because of a claim filed in the court by one John L. Peterson, charging the Hookers and another party with "fraud and misrepresentation."

Mr. Peterson, of nearby Williamson County, claims he was victimized in a stock deal in which Whale acquired a company from him. He claims the Hooker brothers gave him 29,000 shares of Whale stock as part payment for his firm, and he says when he tried to sell some of those shares he was told they were not registered and thus not marketable. Another factor that makes that transaction seem peculiar, Mr. Peterson says, is that the Whale annual report for 1967 says Whale bought his company not for stock but for $55,000 in cash. That's news to him, he says. John L. Chambers, attorney for the Hooker brothers, says "There is no truth whatsoever in the charges. There were no misrepresentations made by the Hookers. There was no fraud practiced by the Hookers."

Judge Gray says he hasn't asked the U.S. attorney here to investigate the fraud charge because he's waiting for a hearing to examine the evidence. Mr. Peterson at first hoped he would work out a settlement with the court-appointed trustee of Whale, but he says he has given up on that and now wants a hearing. His attorney says he plans to ask Judge Gray to set a hearing date soon.

The Political Factor

U.S. Attorney Charles Anderson says he could initiate action in the case himself, but he has been waiting for someone else to do so. Some sources here reason that Mr. Anderson, a Republican appointee, is reluctant to start a probe into the affairs of a Democratic gubernatorial candidate during an election campaign lest his office be accused of conducting a political vendetta.

The other Federal judge that Mr. Hooker sold stock to privately has also come under criticism for his dealings, but, like Judge Gray, he denies wrongdoing. He is William E. Miller, who recently was elevated from the District court here to the Sixth Circuit Court of Appeals in Cincinnati. In a Senate hearing on Judge Miller's appointment last March, attorney Farmer—the one who says Judge Gray should step down from the Whale case—charged that Judge Miller tried to circumvent Federal laws when he bought stock from Mr. Hooker.

The stock for sale in the initial private offering was offered to Tennessee residents only, but Judge Miller wanted to buy shares for his daughter, a resident of Virginia. When the transfer agent told him he couldn't do that, he bought the shares in his own name. When he later sold them, his daughter received the proceeds and paid the capital gains tax.

Judge Miller says he was not dodging the intent of the law. "I did not violate or circumvent any law," he says. He said the same thing at a Senate Judiciary Committee hearing conducted by Sen. Roman Hruska, and the commitee agreed. It found "no basis for the charges" and confirmed the appointment, leaving vacant Judge Miller's former post of Chief Judge of the U.S. District Court here. That vacancy was filled—by Judge Frank Gray Jr.

A Judge's Holdings Open Case Anew—After He Dies

By a WALL STREET JOURNAL *Staff Reporter*

It is not true, of course, that dead men tell no tales. If the dead man was in life a judge, he may tell more once he's laid away than he was ever required to reveal while sitting on the bench.

That has happened in the case of Lamar Cecil, a U.S. District judge in Texas in the 1950s, whose death opened the possibility of reversal of a suit he had decided three years earlier.

The suit involved a patent infringement charge. Judge Cecil in 1955 ruled for the defendant, Humble Oil & Refining Co., and that was thought to be that. But when his will was probated in 1958, it was revealed that he owned part of a company that did business with Humble, that he and his wife had other oil interests bringing them income from Humble and that his wife had owned Humble stock until just before he tried the case.

Saying the judge should have excused himself from the case, the plaintiff asked to have the proceedings reopened. Now, after 17 years, the case is still in the courts with no end in sight. "Were Judge Cecil still alive, the case wouldn't still be in the courts because his interests in the oil business wouldn't be (publicly) known to this day," says Fred Parks, Houston attorney for the plaintiff.

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